



RECENT CASES CHALLENGING TRANSGENDER CARE EXCLUSIONS IN PRIVATE EMPLOYER-SPONSORED HEALTH INSURANCE PLANS

May 26, 2015

M.S.

Ms. S is a transgender woman. Her health plan with Aetna, sponsored by her employer, contains the following exclusion:

Sex change: Any treatment, drug, service or supply related to changing sex or sexual characteristics, including: Surgical procedures to alter the appearance or function of the body.

Ms. S applied to Aetna for pre-certification of gonadectomy and vaginoplasty. Her request was denied. She proceeded with the surgery, paying almost \$20,000 out of pocket. Subsequent appeals by Whitman-Walker Legal Services on Ms. S's behalf, to Aetna and to the employer, were unsuccessful.

The employer in question (Ms. S now works for a different employer) is the subsidiary of an Alaska Native Corporation with extensive federal contracts. With Whitman-Walker as counsel, Ms. S filed a complaint with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), for sex discrimination in violation of Executive Order 11246, in December 2013. In January 2014, OFCCP referred the charge filed with it to the EEOC for investigation pursuant to the agencies' work-sharing agreement. Ms. S also filed charges of sex discrimination in violation of Title VII with the EEOC directly against the employer, and against Aetna as the employer's agent.

In June 2014, the EEOC dismissed the Title VII charge against Ms. S's former employer on the grounds that it lacked jurisdiction because the employer was statutorily exempt from Title VII as an Alaska Native Corporation. The EEOC also dismissed the charge against Aetna on the grounds that the insurer was merely administering the employer's decision not to cover transgender health care. The EEOC made no decision regarding the action under E.O. 11246 that had been filed with OFCCP.

We are arguing to OFCCP that the complaint against Ms. S's former employer, who is a government contractor, is still pending and that OFCCP, the agency with jurisdiction to enforce the E.O., should proceed with an investigation. To date OFCCP has not responded.

In March 2014, Ms. S filed a complaint against Aetna with HHS' Office for Civil Rights for sex discrimination under Section 1557 of the ACA. After more than a year of delay, OCR personnel staff recently informed us that they have begun an investigation.

J.D.

Mr. D is a transgender man. He has health insurance with Kaiser under a plan sponsored by his employer. The Kaiser plan contains the following exclusion:

Treatment leading to or in connection with transsexualism, or sex changes or modifications, including but not limited to surgery.

Mr. D sought pre-authorization from Kaiser for two surgical procedures: a metoidioplasty and vaginectomy. After sending conflicting responses, Kaiser denied pre-authorization for both procedures. Mr. D underwent the procedures in 2014, and paid more than \$34,000 out of pocket. His requests for reimbursement, and appeals from the denials of pre-authorization, have been unsuccessful.

Through Whitman-Walker as counsel, Mr. D filed a complaint against Kaiser with HHS' Office for Civil Rights for sex discrimination under Section 1557 of the ACA in July of 2014. After many months of delay, OCR staff recently informed us that they have commenced an investigation of the complaint.

Mr. D also appealed Kaiser's denial of pre-authorization of his claim to the Maryland Insurance Administration (MIA). The MIA conducted an investigation and initially determined that Kaiser had not violated any governing insurance law, because existing insurance regulations permit insurance carriers to exclude coverage of gender-transition surgery. We have filed a request for a hearing before the MIA, arguing, *inter alia*, that the insurance regulation violates Maryland civil rights statutes and the Maryland Constitution. The hearing currently is scheduled for July 23, 2015.

Mr. D decided not to proceed against his employer under Title VII because he did not want to jeopardize his relationship with the employer. It also appears that Kaiser did not make available to the employer (who is small) the option of purchasing a rider that would permit coverage for gender-transition care.